

IN THE CIRCUIT COURT OF KANAWAH COUNTY, WEST VIRGINIA

CONNIE SUE WHITESIDE,
Petitioner,

v.

MICHAEL BRENT WHITESIDE,
Respondent.

CIVIL ACTION NO. 01-D-179

ORDER

The petition for appeal of final order dated November 29, 2006, filed by Connie Sue Whiteside by Counsel on December 7, 2006 and assigned to the undersigned Judge, is hereby **DENIED**.

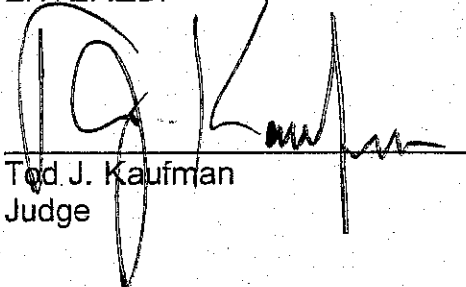
This appeal is **DISMISSED** from the Circuit Court docket and certified copies of this Order shall be sent to the following:

Steven L. Thomas, Esquire
Kay Casto & Chaney, PLLC
Post Office Box 2031
Charleston, West Virginia 25327

Michael B. Whiteside
310 Wise Drive
Malden, West Virginia 25306

W. Bradley Sorrells, Esquire
Robinson & McElwee, PLLC
Post Office Box 1791
Charleston, West Virginia 25326

ENTERED:


Tod J. Kaufman
Judge

DATED: December 11, 2006

STATE OF WEST VIRGINIA
COUNTY OF KANAWAH
CLERK OF CIRCUIT COURT OF SAID COUNT.
I HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE
ORDER OF SAID COURT.
December 12, 2006
Cathy S. Ballou
CLERK

FILED

2006 DEC 11 PM 3:23

IN THE FAMILY COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

CONNIE SUE WHITESIDE,

Petitioner/Plaintiff,

v.

MICHAEL BRENT WHITESIDE,

Respondent,

and

EQUITY HOLDINGS, LLC,

Defendant.

2006 NOV 30 AM 11:40

CATHY A. CATSON, CLERK
KANAWHA CO. CIRCUIT COURT

Civil Action No. 01-D-179

ORDER

At a hearing held pursuant to notice on October 2, 2006, the Court considered competing dispositive motions filed by the plaintiff, who is now known as Connie Varney, and the defendant, Equity Holdings, LLC. These motions were the plaintiff's **Motion to Set Aside Transfer of Property to Third Party and Enforce Final Order** ("the Motion to Set Aside") and Equity Holdings' **Amended Motion to Dismiss** ("the Motion to Dismiss"). Ms. Varney appeared in person and by her counsel, Steven L. Thomas. Equity Holdings appeared by its principal, Kent J. George, and by its counsel, W. Bradley Sorrells.

At issue in this matter is title to a one-half undivided interest in some 19 acres of real property ("the Property"), which is comprised of five lots in North Charleston, West Virginia.

101-02

The Property was acquired by Michael and Connie Whiteside in 1996. Motion to Set Aside at 1. The parties agree that the Property is contiguous to a tract of over 200 acres that Equity Holdings purchased in June of 2003 from the Trustee in the Whiteside's Chapter 7 bankruptcy case. They also agree that in November of 2003 the Chapter 7 Trustee attempted to sell the Property to Equity Holdings, but that the proposed sale fell apart in the face of a competing bid made by Ms. Varney. Because either sale would have netted only \$1,000 for the Bankruptcy Estate, the Bankruptcy Court suggested that the Trustee should take the course of "abandoning [the Lots] and leaving the parties to their own." Exhibit F of Motion to Set Aside at 21. The Court is advised that the Trustee did abandon the Property in July of 2004 and later that month Michael Whiteside sold his one-half undivided interest to Equity Holdings. At the time of that sale there had been no Order entered under Article 7 of Chapter 48 of the West Virginia Code that defined the parties' rights and interests under the doctrine of equitable distribution. The first and only Order defining such rights and interests was the Final Order entered on February 1, 2005.

Based upon the applicable law, the parties' written and oral argument, and for reasons more fully stated upon the record, the Court makes the following findings of fact and conclusions of law:

1. Michael Whiteside sold his one-half undivided interest in the Property to Equity Holdings on July 23, 2004. On January 7, 2004, at a hearing held in the United States Bankruptcy Court for the Southern District of West Virginia, Equity Holdings, LLC was present (by its principal, Kent J. George, and its counsel, W. Bradley Sorrells) when Ms. Varney's counsel asserted in connection with her upset bid for the subject property, that she had a right of offset by which she intended to take credit for unspecified amounts that she asserted were owed to her by Michael B. Whiteside.

2. Two Sections of the West Virginia Code are relevant to the claims against and defenses of Equity Holdings in this matter, §§ 48-7-108 and 48-7-304. For ease of reference both Sections are set forth in full on Exhibit A of this Order.

3. At the time of that sale to Equity Holdings, no Order had been entered in this case that judicially defined any right, title or interests under the doctrine of equitable distribution, and no lis pendens had been recorded with respect to the Property.

4. At all times relevant to this matter, Equity Holdings was a "third party" within the meaning of W.Va. Code § 48-7-108.

5. As to Equity Holdings, Connie Varnie had no interest or title in Michael Whiteside's one-half undivided interest in the Property when that interest was sold to Equity Holdings.

6. The sale of Michael Whiteside's one-half undivided interest in the Property to Equity Holdings was supported by full and adequate consideration.

7. Equity Holdings was a bona fide purchaser of Michael Whitesides' one-half undivided interest in the Property, without notice of any fact or condition that would support setting aside the sale under W.Va. Code §§ 48-7-108 or 48-7-304.

8. Connie Varney and Equity Holdings are co-owners of the Property, with each owning a one-half undivided interest.

9. Connie Varney's remedy with respect to Equity Holdings is limited to the relief of partition, which is already the subject of civil action between these parties (No. 05-C2159) in the Circuit Court of Kanawha.

Accordingly, it is hereby **ORDERED**:

1. The Motion to Set Aside is **DENIED**;
2. The Motion to Dismiss is **GRANTED** and Equity Holdings is hereby dismissed from this action with prejudice; and
3. A copy of this Order shall be delivered to the Honorable Irene Berger, as it directly relates to Civil Action No. 05-C-2159, which she Ordered stayed pending this Court's resolution of the Motion to Set Aside.

The plaintiff's objections are hereby noted and preserved.

ENTER: This 29th day of November, 2006

Date: 12-1-06
Certified copies sent to:
☒ Counsel of record SKT. W. AS
☐ parties
☐ other
(Please indicate)
By: ☒ Certified/1st class mail
☐ fax
☐ hand delivery
☐ interdepartmental
Other directives accomplished:
[Signature]
Deputy Circuit Clerk

[Signature]
JANE CHARNOCK SMALLRIDGE
FAMILY COURT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF December 2006
[Signature] CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE FAMILY COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

CONNIE SUE WHITESIDE,

Petitioner,

v.

CIVIL ACTION NO. 01-D-179

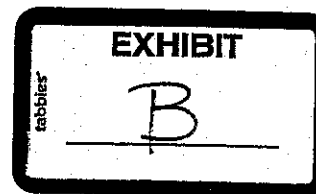
MICHAEL BRENT WHITESIDE,

Respondent.

FINAL ORDER

On the 5th day of January, 2005, came the Petitioner, Connie Sue Whiteside, now Connie Sue Varney, in person and by counsel, Beverly S. Selby, and came also the Respondent Michael Brent Whiteside, in person, *pro se*, for a final hearing in this matter. Whereupon, the Court heard the testimony of the parties and the arguments of counsel and does hereby make the following Findings of Fact and Conclusions of Law:

1. That the parties to this action were divorced by Bifurcated Order entered March 30, 2004.
2. That the parties are the parents of one (1) child, namely, Sarah, age 15 years.
3. That the parties have agreed that Sarah is of an age to determine her own parenting schedule. Based upon the parenting schedule that has been followed since the parties have been separated, the Court find that the standard shared parenting child support formula applies.
4. In considering the matter of child support, the Court has considered the following factors:
 - a. Mother receives Social Security Disability income.
 - b. The child does not have the derivative share of that benefit.



c. There is no parenting plan as the child is old enough to determine when, when and how she chooses to spend her free time. There are no day care expenses.

d. The father is educated as a mining engineer. He no longer works in that industry and is working below his capabilities at CASCI in customer service.

e. Father makes approximately \$16,000 per year at CASCI. He admits to working on the side as a mining engineer and/or consultant and estimates that he make \$20,000 on the side.

f. The Court was inclined to make a specific finding that the father is underemployed so as to reduce available amount for child support purposes and would have imputed additional income on top of the admitted \$1,610.27 per month from CASCI and the additional \$1,666 from consultant work, but the father has agreed to pay additional child support based upon income of \$75,000 per year.

g. The father also pays all tuition costs at the child's private school.

h. The child support formula would yield an obligation of \$438.09 per month, but Father has agreed to continue paying \$660.00 per month.

5. The Court finds that the parties to this matter have recently concluded proceedings in Bankruptcy Court. Thus, there is little, if any, property to be divided through equitable distribution.

6. By agreement of the parties, each party shall retain as his or her personal property that personal property which is currently in his or her possession and shall waive any interest to the personal property currently in the possession of the other.

7. There exists one piece of real estate subject to equitable distribution, that being lots 62, 63, 64, 95 and 96 located at Willowood Addition, Charleston, Kanawha County, West Virginia, which property has been valued by the Bankruptcy Court at \$15,000. Both parties have stipulated that the value of this property is \$15,000. The wife seeks an offset against the husband's interest in this property of \$822.24 for one-half (1/2) of her redemption of said property for non-payment of taxes, \$233.50 in attorney's fees for Attorney Steve Thomas who

represented her in protecting her interest in this property before the Bankruptcy Court and \$4,000 for one-half (1/2) the value of the Baldwin grand piano listed by the husband as an asset in Bankruptcy Court then sold by him. The Court finds that the wife is entitled to these off-sets against the husband's interests in said property. In the interest of settling this litigation, the husband has stated on the record that he has no objection to executing a deed conveying his interest in this property to his ex-wife. Robert Fletcher, an attorney practicing before the Bar of this Court, is hereby appointed special commissioner to execute the transfer of said property should the husband fail to do so.

8. The Court finds that at a prior hearing in this matter, namely on April 25, 2001, this Court awarded to Petitioner temporary alimony in the amount of \$200 per month beginning May 1, 2001. However, no temporary order to this effect was ever entered. Later, on September 17, 2001, the Court modified this amount to \$500 per month in temporary alimony commencing October 1, 2001. Again, however, no order was entered. The parties agree and stipulate that the husband voluntarily paid \$500 per month in temporary alimony until February 2004. The Court finds that in February 2004 the husband filed a Petition to Modify Alimony and Child Support. Husband has continued to pay child support of \$660 per month, which is \$220 per month more than he would be required to pay under the existing formula in West Virginia. The wife has announced to the Court that she is not seeking any reimbursement for back pay of alimony for the period from February 2004 to the present. The Court finds under all these circumstances that no award of back alimony is appropriate in this case.

9. The wife seeks permanent alimony in this matter. The husband argues that the wife is not entitled to any alimony beyond what he has already paid. In considering this matter the Court has examined those factors contained in West Virginia Code, §48-6-301 and makes the following Findings of Fact and Conclusions of Law:

a. That the parties to this action were previously married for a period of ten (10) years, divorced less than one (1) year and then remarried for a period of six and a half (6 1/2) years. However, for the purposes of determining alimony in this matter this Court will

only consider the second marriage of 6 1/2 years, which is not a marriage of particularly long duration.

b. There is a disparity of income between the parties. The wife currently receives \$1,420 in Social Security Disability income. This sum is fixed and there is no action that can be taken by the wife to increase her income, absent some change in circumstances with respect to her health.

c. During the period of the marriage the husband had a top income of \$233,000 per year, while he currently earns approximately \$35,000 per year through his employment at CASCI and additional consulting income.

d. The Court finds that the husband is a mining engineer, but that he no longer works in that industry and is working below his earning capacity.

e. The income earning ability of the husband is greater than that of the wife based upon his educational background, training, employment and work experience, whereas the wife's income is limited to the money she receives through SSI.

f. The standard of living of both parties has been greatly decreased when compared to that during their marriage.

g. No additional training would further the earning capacity of the wife due to her current health conditions.

h. Both husband and wife are 48 years old.

i. Due to the bankruptcy, the distribution of marital property in this case does not effect the issue of alimony.

j. The Court finds no fault factor as between the parties to be applicable in this case.

10. Based upon all the foregoing factors, the Court finds that \$200 per month in alimony is appropriate in this case and so orders commencing January 1, 2005 and on the first day of each month thereafter until the wife shall either die or remarry or until further order of this Court.

WHEREFORE, having made the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED as follows:

1. Based upon the parenting schedule that has been followed since the parties have been separated, the Petitioner is hereby designated the primary custodial parent for purposes of State and Federal law.

2. Father shall pay unto the mother the sum of \$660.00 per month in child support until the child shall attain the age of 18 years or shall graduate from high school, whichever shall later occur.

3. Each party shall retain as his or her personal property that personal property which is currently in his or her possession and shall waive any interest to the personal property currently in the possession of the other.

✓ 4. There exists one piece of real estate subject to equitable distribution, that being lots 62, 63, 64, 95 and 96 located at Wildwood Addition, Charleston, Kanawha County, West Virginia. Husband shall execute a deed conveying his interest in this property to his ex-wife. Robert Fletcher, an attorney practicing before the Bar of this Court, is hereby appointed special commissioner to execute the transfer of said property should the husband fail to do so.

5. Husband shall pay unto Wife permanent alimony in the amount of \$200 per month commencing January 1, 2005 and on the first day of each month thereafter until the wife shall either die or remarry or until further order of this Court.

This is a Final Order which any party may appeal. An appeal of this Order must be filed in the Circuit Clerk's office of this county. A party to this Order may appeal to the Circuit Court if an appeal is filed within 30 days of the date of entry of this Final Order. If both parties file an appeal to the Supreme Court within 14 days of the date of entry of this Order, the parties may appeal directly to the Supreme Court. If only one party timely files an appeal to the Supreme Court that appeal will be treated as a petition for appeal to the Circuit Court.

The Circuit Clerk is hereby ORDERED to provide a certified copy of this Order to
Connie Sue Varney through her counsel at the address listed below and to Michael Brent
Whiteside at his last-known address of 310 Wise Drive, Malden, West Virginia.

Jane Charnock Smallridge
Jane Charnock Smallridge, Judge

Date: 2/1/05

Presented by:

BSSelby
Beverly S. Selby (WV Bar #4721)
1200 Boulevard Tower
1018 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 342-0411

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1ST
DAY OF February 2005
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 2-1-05
Certified copies sent to:
☒ counsel of record
☒ parties
☒ other GCSE
(please indicate)
By: ☒ certified/1st class mail
☒ hand delivery
☒ interoffice memo
Order directed accomplished
[Signature]
Deputy Circuit Clerk